

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

74-1749 ORIGINAL

TO be argued by
JOHN C. KLOTZ

B
P/S

In The
United States Court of Appeals

For The Second Circuit

IRVING GORDON,

Appellant,

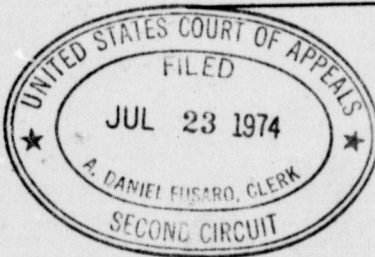
vs.

ROBERT L. BURR, ELPAC, INC., ARNOLD LORD, and
PHILIPS, APPEL & WALDEN, INC., (sued herein as
PHILLIPS, APPEL & WALDEN),

Appellees.

*On Appeal from the United States District Court for the
Southern District of New York.*

APPELLANT'S BRIEF



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STATEMENT

This is an action pursuant to Section 10(b) of the Securities Exchange Act of 1934 and Regulation 240.10 b-5 wherein Plaintiff-Appellant IRVING GORDON sought rescission of a sale of securities to him and restitution against the seller of the securities, defendant ROBERT L. BURR ("BURR"); the salesman, defendant ARNOLD LORD ("LORD"); the salesman's brokerage firm, defendant PHILIPS, APPEL & WALDEN, INC. ("PHILIPS, APPEL & WALDEN"); and the issuers of the securities, defendant ELPAC, INC. ("ELPAC").

Appellant IRVING GORDON appeals to this Court from the judgment of the United States District Court for the Southern District of New York, entered December 12, 1973, dismissing his claim for violations of the securities laws against defendants LORD, and PHILIPS, APPEL & WALDEN on the grounds that he failed to state a claim against those defendants and against defendant ELPAC on the merits. The action was tried by

Honorable Arnold Bauman, District Judge, without a jury, and his opinion is reported at 336 F.Supp. 156 (S.D.N.Y. 1973). Plaintiff also appeals the denial of his motion to vacate the judgment, or in the alternative, for a new trial. Said motion was denied by memorandum dated May 2, 1974.

INTRODUCTION

This was an action for rescission brought by the plaintiff against all of the defendants claiming that certain securities laws were violated in the sale to Appellant by BURR of 4,500 shares of stock of ELPAC for the sum of \$45,000 (4a). Defendant LORD was a registered representative of PHILIPS, APPEL & WALDEN and functioned as broker in the transaction. The complaint originally sought rescission of the sale for damages in the alternative, but at the trial Appellant elected rescission. The court held that by electing rescission Appellant failed to state a claim against defendants LORD and PHILIPS, APPEL & WALDEN, even though the court found as a matter of fact LORD had violated the Securities Exchange Act and was liable to Appellant, and that PHILIPS, APPEL & WALDEN was a controlling person of LORD, and under the facts as found by the court, liable for LORD's actions (40a).

As to defendant ELPAC, the court found as a matter of fact that it had not participated in the securities violations

and was not a controlling person of BURR. (42a).

The Appellant, surprised at the court's ruling that an election of rescission exonerated LORD and PHILIPS, APPEL & WALDEN moved promptly to vacate the judgment, or in the alternative, for a new trial on the issue of damages (58a). That motion was denied (64a).

The issues presented on this appeal are:

1. Whether an election of rescission exonerates culpable individuals who are not in privity of contract with the plaintiff; and
2. Whether the court abused its discretion in failing to grant a new trial as to damages; and
3. Whether defendant ELPAC was liable for violating the securities laws; and
4. Whether in any event the action should have been dismissed with prejudice against defendants PHILIPS, APPEL & WALDEN, and LORD.

FACTUAL BACKGROUND

The District Court in its opinion made extensive findings of fact (21a to 27a). It found, among other things, that:

In June, 1968 at the invitation of defendant LORD, Appellant attended a meeting in New York City at which at least three representatives of defendant PHILIPS, APPEL & WALDEN were present, including defendant LORD and Stuart Steinberg, Jr. ("STEINBERG"). Also present at the meeting was BURR, who at the time was president of ELPAC (22a).

At the meeting a proposal by BURR to sell a block of 20,000 shares in defendant ELPAC was discussed, and it was Appellant's understanding that participants in the meeting, together with himself, were to purchase the block, and that one of the participants was purchasing twice as many shares as Appellant. Also, certain conditions as laid down by an attorney for one of his co-purchasers, were to be fulfilled by the consummation of the sale (23a).

In August, 1968 at the insistence of defendant LORD, Appellant filled out certain documents at the offices of

defendant PHILIPS, APPEL & WALDEN in connection with the proposed sale and was informed "everybody has already done it". (24a)

Thereafter on August 20, 1968 Appellant received a telegram from defendant BURR agreeing to sell Appellant 2,500 shares of ELPAC at \$10.00 per share and reciting that the ELPAC board had approved registration of the securities (25a).

After consultation with BURR and LORD, who was at BURR's office, Appellant made arrangements with his bank to wire the funds to California and they were so wired. (25a)

Thereafter in the months that followed Appellant was unsuccessful in obtaining either promised documentation or the stock certificates although he repeatedly spoke to BURR and LORD by phone in September and October. (26a)

Although LORD left PHILIPS, APPEL & WALDEN in the fall of 1968, Appellant was not so informed by PHILIPS, APPEL & WALDEN despite numerous phone calls by Appellant to LORD at PHILIPS, APPEL & WALDEN and at least one visit in December, 1968 or January, 1969. (26a)

In March, 1969, at LORD's suggestion, Appellant once more visited the offices of PHILIPS, APPEL & WALDEN and there met STEINBERG. Then for the first time he was informed that STEINBERG had not purchased any stock in ELPAC and neither had anyone else who had attended the original meeting (26a). Shortly thereafter, Appellant received his stock for the first time, and Appellant promptly sought a return of his money in exchange for the stock. However his efforts to obtain a refund of the purchase price were unsuccessful (27a).

The record of trial reveals other facts about ELPAC's involvement which were not included in the trial court's findings of fact. Prior to the sale, and at a time when he was still president of ELPAC, BURR stated that the shares of stock being sold had been hypothecated to secure a loan to ELPAC (86a). At the same time BURR stated that the proceeds from the sale of stock were to be used to pay for the bank loan to ELPAC (240a, 241a). In addition, BURR stated that the stock would be registered, and the consent of the corporation

to the sale would be obtained (87a). On August 20th, while BURR was still a member of the Board of Directors to ELPAC, he wired Appellant and stated that registration of the stock had been approved by the ELPAC board on August 7, 1968 (Exhibit "4", 346a). At the trial, plaintiff demanded production of the minutes of the August 7, 1968 meeting of ELPAC. ELPAC did not produce them claiming they were unavailable (323a).

POINT I

CONTRARY TO THE DECISION OF THE
DISTRICT COURT, AN ELECTION OF
RESCISSION DOES NOT EXONERATE
JOINT TORT FEASORS MERELY BECAUSE
THEY ARE NOT IN PRIVITY OF CONTRACT
WITH THE PLAINTIFF.

- a. The full arsenal of traditional equity remedies is available to those damaged by securities frauds.

Where a private right of action inures to an injured party by reason of the violation of a federal statute, the full arsenal of equitable remedies is available to the injured party. The Supreme Court in the case of Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946) said:

"...Unless a statute in so many words, or by a necessary and inescapable inference, restricts the Court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. 'The great principles of equity, securing complete justice, should not be yielded to light inferences or doubtful construction.' Brown v. Swann, 10 Pet (U.S.) 497, 503, 9 L. Ed. 508, 511. ..."

Thus, in determining the nature and extent of the remedies to be afforded the Appellant, once a violation

is discerned, we must set our compass by the enduring principles of equity as they have been applied by federal courts for generations. In the context of violations of proxy regulations promulgated pursuant to the Securities Exchange Act, the Supreme Court said:

"...It is for the federal courts 'to adjust their remedies so as to grant the necessary relief' where federally secured rights have been invaded 'And it is also well settled that where legal rights have been invaded and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done'...Section 27 grants the District Courts jurisdiction 'of all suits in equity and actions at law brought to enforce any liability or duty created by this title...' In passing on almost identical language found in the Securities Act of 1933, the Court found the words entirely sufficient to fashion a remedy to rescind a fraudulent sale, secure restitution and even to enforce the right of restitution against a third party holding assets of the vendor...Deckert v. Independence Shares Corp., 311 U.S. 202 (1940). This significant language was used:

'The power to enforce implies the power to make effective the right of recovery afforded by the Act. And the power to make the right of recovery effective implies the power to utilize any of the procedures or actions normally available to the litigant according to the exigencies of the particular case...' J.I. Case Company v. Borak, 377 U.S. 426, 433, 434 (1969).

Thus it is clear that an equitable action for rescission shall lie for a violation of Section 10b. John Hopkins University v. Hutton, 343 F.Supp. 245 (D. Md. 1972) reversed on other grounds, 488 F.2d 912 (4th Cir. 1973) cert. den. 94 S.Ct. 1623 (1974); Myzel v. Fields, 386 F.2d 718 (8th Cir. 1967) cert. den. 390 U.S. 951 (1968); Adelman v. CGS Scientific Corp., 332 F.Supp. 137 (E.D. Pa. 1971); John R. Lewis, Inc. v. Newman, 446 F.2d 800 (5th Cir. 1971).

In the instant case, the District Court found that plaintiff was entitled to rescission but denied any relief as to participants in the fraud who were not in privity of contract with the plaintiff. Thus our inquiry is not whether rescission is an appropriate form of relief for violations of Section 10b, but whether a meritorious claim for rescission states a claim against participants in the fraud who were not in privity of contract with the plaintiff.

b. A bill for rescission does state a claim against participants in a fraud who were not in privity of contract.

In its initial decision the court found as a matter of

fact that defendants LORD, BURR, and PHILIPS, APPEL & WALDEN were liable for their violations of the Securities Exchange Act. However, the court concluded that plaintiff, by having chosen rescission, stated no claim against either defendants LORD or PHILIPS, APPEL & WALDEN (46a). This holding is clearly erroneous. John Hopkins University v. Hutton, supra.; Mack v. Latta, 178 N.Y. 525 (1904); Keskal v. Modrakowski, 249 N.Y. 406 (1928); Loud v. Clifford, 254 N.Y. 216 (1930); Lehman-Charley v. Bartlett, 135 A.D. 674 (1st Dept. 1909) affirmed 202 N.Y. 524 (1911); Kaufman v. Jaffee, 244 A.D. 344 (1st Dept. 1935); P.S. & A. Realtips, Inc. v. Lodge Gate Forest, Inc., 127 N.Y.S. 2d 315 (Sup. Ct., N.Y. Cty. 1954); Moredita v. Ramsdell, 384 P. 2d 941 (Colo. 1963); Hedden v. Griffin, 136 Mass. 229 (1884). See also McCandless v. Furland, 296 U.S. 140, 165 citing with approval Mack v. Latta, supra.

In each of the cases cited above, it was recognized that participants in a fraudulent transaction, even if they were not in privity of contract with the plaintiff were responsible for restitution to the plaintiff. These cases

also make clear, that whether at common law or in equity, that the joint tortfeasors were not being held responsible for common law damages but for restitution of the purchase price.

The basic error of the District Court was its failure to comprehend that a decree of rescission ordering restitution may also order restitution from joint tortfeasors and that such a decree is not a judgment for common law damages.

It is an ancient maxim of equity that where there is a right there is a remedy. It would be a grave injustice to hold, as the District Court did, that plaintiff's election of an equitable remedy, exonerated those who participated in the fraud upon the plaintiff. The case Mack v. Latta, supra, is eminent authority for holding that in an equitable action for rescission based on fraud, the plaintiff should have restitution, not only from the party with whom he contracted, but also from those guilty of misrepresentations upon which the bill for rescission is founded. Thus the court after an exhaustive review of applicable American and English precedents

stated (178 N.Y. at 535):

"These decisions seem to us so well grounded in reason as to justify a court of equity -- invoked to cancel a subscription for stock on the ground of fraud, and enjoin further calls for payment, and the prosecution of actions thereon -- in bringing in the officers and agents of the corporation who were personally guilty of making the misrepresentations constituting the fraud, so that plaintiff may have complete relief in one action against both the corporation and the persons guilty of the fraud."

Care must be taken not to confuse this equitable remedy of rescission with actions for fraud and deceit for damages. None of the cases cited by the court in its opinion exonerating LORD, and PHILIPS, APPEL & WALDEN after finding that they were culpable, dealt with the question of restitution being decreed against them in context of a rescission action. Rather the cases cited relied upon by the court and cited by the defendants to the court, were uniformly cases dealing with actions for damages rather than restitution.

Although there does not appear to be any federal decision explicitly dealing with the issues of this appeal, there is a decision in the Fourth Circuit, which implicitly sustains Appellant's position. John Hopkins University v. Hutton, supra.

The identical issue of ordering restitution against participants in a securities fraud who were not in privity of contract with the plaintiff, is involved in the rather complex litigation between John Hopkins University ("Hopkins") and William E. Hutton & Company ("Hutton"). In that case, the dispute revolves around the sale of oil and gas production payments to Hopkins by Trice Production Company ("Trice"). This complex and contentious litigation has been the subject of several reported decisions as the United States District Court for Maryland, the United States Court of Appeals, Fourth Circuit, and even the Supreme Court have been asked to grapple with the complex legal and factual issues.

It is significant that the key issue of the instant case has never been raised in any of the decisions in that case. In spite of the fact that Hutton was only a broker in the transaction and was found liable only for the misrepresentation of its employee (Hubert A. LaPiere) and that the consideration was paid to Trice for the security at a closing not even attended by Hutton, the District Court nonetheless granted summary rescission relief and directed

settlement of an order compelling Hutton to repay Hopkins the purchase price which had in fact been paid to Trice. (343 F.Supp. 245, 262).

On appeal, the Court of Appeals affirmed in part, reversed in part and remanded. (488 Fed. 2d 912). Its reversal was not on the grounds that Hopkins could not claim rescission against Hutton but only on the grounds that Hutton was entitled to a jury trial as to the diligence of Hopkins in seeking rescission. (In the case at bar, the court found as a matter of fact after the trial, that Appellant had been diligent in seeking rescission [44a, 45a]).

Although the Court of Appeals in its decision did not address itself directly to the question of whether rescission is available against Hutton, such a determination is implicit in its holding. Elsewise, no trial would be necessary. The case is therefore clear authority for the proposition that in an action for rescission, restitution may be ordered from culpable parties not in privity of contract.

c. Defendants ELPAC, LORD, and PHILIPS, APPEL & WALDEN are proper parties to Appellant's bill for rescission so that a multiplicity of suits might be avoided.

"It is proper, if not necessary, to join as defendants in an action for rescission or cancellation all parties who participated in the fraud which is the basis of the complaint, or who conspired or colluded together to defraud the complainant, though several defendants may have different interests in the results of the fraud..." 3. BLACK ON RESCISSION AND CANCELLATION (2d ed. 1929) §658, pg 1578.

The appropriateness of joinder in an equitable bill was discussed by the Court of Appeals in the case of Mack v. Latta, supra, (178 N.Y. at 529 et seq):

"[I]f plaintiff had brought this action against the corporation alone and obtained a judgment canceling the contract and awarding him the \$100,000 advanced, with interest, and he should have failed to collect from the corporation by reason of its lack of assets, he could undoubtedly have collected the balance unpaid in an action at law against the officers whose fraudulent representations had induced the contract.

"That being so, it is clear that a multiplicity of actions would be avoided, and a **greater** certainty of collection would result in an action before the court -- those guilty of the fraud -- the court could enjoin actions by the corporation for the balance of the subscription, cancel the subscription and give plaintiff judgment against all the defendants for the amount paid, directing collection so far as possible out of the corporation, the balance, if any, to be collected from the individual defendants.

* * *

"Again, it would more promptly, if not more certainly restore to the party injured his

own, for recovery would necessarily be much delayed by procedure requiring him to exhaust his remedy against the corporation before bringing action against the persons actually guilty of the fraud. It is a favorite object of equity to prevent multiplicity of suits." Accord, Kaufman v. Jaffee, 244 App. Div. 344, 279 N.Y.S. 392 (1st Dept. 1935)

The doctrine of election of remedies has no application in the instant case, particularly since there has been no actual rescission of the contract but only its decree. Had the contract been rescinded and the plaintiff restored to his prior position, then the complaint would state not only no claim for relief against LORD, and PHILIPS, APPEL & WALDEN, but also no claim for relief of any kind against defendant BURR. Estate Court Holding Service v. Merrill, Lynch, Pierce, Fenner & Smith, 303 F.2d 527 (10th Cir. 1963). In that case, and in other cases cited by the court, damages were not allowed subsequent to an election of rescission inasmuch as accomplishment of the rescission left the complainant without damage. However in the instant case, plaintiff has not been made whole, and is not seeking damages for fraud. Rather he is seeking rescission which when accomplished will make him whole.

d. Even in an action at law for damages, the proper measure of relief subsequent to rescission is the plaintiff's out-of-pocket loss, and the object of the action is to make him whole.

Even in an action at law for damages it has long been held, that where a contract is rescinded, third parties who participated in the transaction would be liable at law for damages if the rescission had not made the complainant whole.

In Kuechle v. Springer, 145 Ill. App. 127 (1913), plaintiff deeded her property to one Maginnis in reliance on defendant Springer's misrepresentations as to the value of worthless notes exchanged for her property. After being successful in an action against Maginnis to rescind her deed, plaintiff sued defendant Springer for damages. Springer argued the prior suit for rescission was an election of remedies barring the present action. In rejecting this argument and finding for plaintiff, the court held (p.137):

"The doctrine of election between inconsistent remedies, on which defendant's counsel rely, applies solely to the parties to a contract, as, for instance where there has been a breach of a con-

tract by one of the parties to the contract. It has no application as between one of the parties to a contract and a third person, a stranger to the contract.

In Nash v. Minn. Title Ins. & Trust Co., 163 Mass. 574, the court said: 'In rescinding a contract, and in enforcing rights growing out of such rescission, one would expect to look only to the other party to the contract. The nature and effect of such rescission are such that they can have no consequences except as against the other party to the contract'. In that case the plaintiff had purchased certain bonds of one Davis, induced thereto by alleged fraudulent representations of the defendant corporation, and, after rescinding the contract between him and Davis, he brought suit against the corporation for the fraud. In respect to this, the court said: 'We do not think the plaintiff's rescission of the contract, on account of the fraud, defeats their right to recover their damages from a third party, so long as they have failed to obtain satisfaction of their injury, either by a restoration or recovery of the consideration, or otherwise'. See, also, Mack v. Latta, 178 N.Y. 525. We are of the opinion that the proceedings and decree in the Wisconsin suit, for the cancellation of plaintiff's deed to Maginnis, are not a bar to the present action." Underscoring added)

Similarly, in Godefroy v. Reilly, 262 P. 639 (Wash. 1928), plaintiff, after suing to rescind an exchange of real estate sought damages from the broker for fraudulent misrepresentations. The court held the rescission action did not bar the action against the broker because "the doctrine of election of remedies cannot be applied

between one of the parties to a contract and a third person, a stranger thereto, since it is applicable only to the parties to the contract." 262 P. at 642.

In Schelske v. Smith, 54 S.D. 217, 222 N.W. 941 (1929) opinion adhered to on rehearing 55 S.D. 502, 226 N.W. 734, a cashier of defendant bank fraudulently issued a certificate of deposit to a purchaser who used same to buy plaintiff's land. Plaintiff instituted a suit for rescission against the purchaser and a separate suit for damages against the defendant bank for its employee's fraud. The court rejected the bank's argument of election of remedies and held the pendency of the rescission suit did not preclude the action for damages against the bank.

On the issue of damages, however, the Court ruled there can only be one recovery and "the pendency of the suit for rescission made it impossible to determine the amount of damages suffered from the act of the cashier, since if plaintiff should succeed in recovering his property in whole or in part the amount of damages he could recover from the bank would be correspondingly affected." (Commentary on case in 123 A.L.R. 386).

Thus, even at common law where plaintiff has lawfully elected rescission, the measure of his damages is the degree of restitution accomplished. If restitution is accomplished, no damages against anyone may be recovered. The election for restitution is an election to be made whole and whether at law or in equity, relief is measured by the extent plaintiff has been made whole.

The better procedure is the one followed by the plaintiff herein of **joining all** of the parties in a single, equitable action seeking rescission. As all of the authorities cited indicate, the joint tortfeasors remain liable for the damages to the plaintiff after election of rescission at least insofar as restitution is not fully accomplished. By having all of the parties before the court at this time, the court is empowered to in one decree adjust all of the equities in the situation. Therefore it is submitted that the court should properly order restitution from all of the parties found liable for plaintiff's damages as is contemplated in the John Hopkins University v. Hutton case previously cited. In the alternative the court might order that restitution be first sought from BURR and the other

defendants be liable only to the extent that BURR fails to make restitution. In any event, the long standing principles of equity as applied by federal courts require that complete relief be afforded in this action and that plaintiff ought not be required in rescinding this contract to bring successive actions, one for rescission and one for common law damages.

POINT II

THE AUTHORITIES CITED BY THE
DISTRICT COURT ARE INAPPOSITE
TO THE RESULT OBTAINED -- THE
EXONERATION OF DEFENDANTS
LORD AND PHILIPS, APPEL &
WALDEN.

In its opinion denying Appellant's motion to vacate the judgment herein, the District Court dwelt at length with the issue of "election of remedies" and brusquely fobbed-off the issue of the joinder by Appellant of LORD and PHILIPS, APPEL & WALDEN in a bill for rescission. The court said:

"... He [Appellant] thus appears to be seeking what amounts to an order of rescission against LORD and P. A. & W.; since they were not selling that is, of course, impossible." (67a)

This statement of the District Court is naked of citation and from the plethora of authority cited in Point I of this brief, simply incorrect. It is possible to order restitution from joint tort feasons or other culpable parties even though they are not in privity of contract. Moreover, several of the cases cited by the court in support of its

holding that an election of remedies had been made are inapposite to the exoneration of LORD, and PHILIPS, APPEL & WALDEN, since they deal with situations where rescission had been accomplished and the plaintiff made whole. In this case it is quite clear that the election of rescission at the end of plaintiff's case did not make plaintiff whole at all.

For example, of the cases cited by the court on page 2 of its opinion (65a), Estate Counseling Service v. Merrill, Lynch, Pierce, Fenner & Smith, supra, dealt with a situation where the plaintiff had made no out-of-pocket payments to the defendant and thus there was no need for restitution at all. United Forest Products Co. v. Baxter, 452 F.2d 11 (8th Cir. 1971) involved a situation where the plaintiff had entered into a second agreement superseding a prior agreement which was the basis for the suit. The court held that a rescission of the first contract resulted from the second contract and vitiated any actions for damages arising out of the first contract. Finally, in the case of Bostwick v. Cohen, 319 F.Supp. 875 (N.D. Ohio 1970), the court held that where

the purchaser rescinded a contract pursuant to the Consumer Credit Protection Act and had no out-of-pocket expenses, no action for damages would lie since he had suffered no losses.

In the instant case, as noted above, rescission has been ordered and plaintiff has not been made whole. Therefore each of the cases noted which deal with a plaintiff having been made whole, then seeking damages, has no application in the instant case. The traditional disdain of equity for a multiplicity of suits argues strongly for the procedure being followed by the plaintiff; that is, the joining of all culpable parties in a single bill for rescission. As noted in Point I, this is a correct and proper procedure and a bill for rescission decreeing restitution can lie.

None of the cases cited on page 3 of the opinion (66a) supports the dismissal of the complaint for rescission for failure to state a claim.

POINT III

IF THE DISTRICT COURT WAS
CORRECT IN ITS VIEW OF
RESCISSION, IT ERRED IN NOT
GRANTING APPELLANT A
LIMITED NEW TRIAL AS TO THE
ISSUE OF DAMAGES.

As noted in Point I, the District Court was empowered to order restitution from LORD, and PHILIPS, APPEL & WALDEN, as a part of its decree of rescission. LORD, and PHILIPS, APPEL & WALDEN, have been found to be liable for violations of the Securities Exchange Act. If the court's view of the law is correct, they will escape any liability for their actions. Such a result is not only unjust to the plaintiff, but at odds with the very important role that civil suits play in the regulations of securities.

"To understand the indispensability of private actions in the securities area, and the necessity for facilitating such litigation, it may be illuminating to focus upon the reasons Congress enacted the anti-fraud and antimanipulation provisions of the statutes. Obviously Congress was concerned about the plight of the average public investor who is at a serious disadvantage in dealing with persons

possessing superior knowledge, skill and resources. But the public in the role of investor is only part of the picture. The integrity and efficiency of the securities markets are even more important since our entire economy is dependent upon these markets. The securities market performs the essential function of assessing the value that society places upon the efforts of a particular enterprise so that society can obtain the maximum amount of its preferred goods and services that our resources can produce. This function can be performed effectively only if the delicately calibrated balance of factors affecting demand and supply are allowed to have their impact upon the market place through an unrestricted flow of information and funds. See Crossland & James, *The Gods of the Marketplace: An Examination of the Regulation of the Securities Business*, 48 B.U.L. Rev. 515 (1968). The securities laws seek to prevent restrictions which distort the market's estimate of value. Considering the weighty interests at stake, Congress and the courts justifiably have outlawed all unfair and deceptive practices related to the trading of securities and have encouraged private damage actions to implement the enforcement of the federal securities laws. Chris-Craft Industries, Inc. v. Bangor Punta Corporation, 480 F.2d 341, 357 (2d Cir. 1973).

Given the importance that private actions play in the regulatory scheme, the courts should not lightly countenance the exoneration of individuals who have been found liable for violations of the Securities Act.

Appellant is not asking the court for blind vengeance.

The court had ample justification and legal authority to

order a partial new trial for damages once it held that rescission stated no claim against LORD, and PHILIPS, APPEL & WALDEN. This authority could have been exercised pursuant to Rule 59(a) in order to accomplish justice; under Rule 60(b)(1) for mistake, inadvertence, or excusable neglect; or under Rule 60(b)(6) for other justifiable reasons. Such a partial new trial could be limited to the sole issue of plaintiff's common law damages, i. e. the value of the ELPAC stock when the fraud became known to plaintiff in March, 1969. On the receipt of such testimony, the court could then grant damages to plaintiff against LORD, and PHILIPS, APPEL & WALDEN, as well as BURR.

Plaintiff's request during the trial for rescission did not prevent the court from awarding the relief which the facts require. Rule 54(c) provides in part that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

In Massachusetts Bonding & Ins. Co. v. State of N. Y.,

259 F.2d 33, 40 (2d Cir. 1958), the court noted:

"Of course it is always desirable to urge to the district court the legal theories upon which a party claims decision. But as Rule 54(c), F.R. Civ. Proc. **points out**, it is the court's responsibility to award relief required by the facts on any proper ground, regardless of the theories urged by the parties."

So, too, in Nagler v. Admiral Corp., 248 F.2d 319, 328 (2d Cir. 1957) the court held:

"For it is clear law that it is the duty of the Court to grant the relief which the facts before it require; the legal theories which the parties may have suggested or relied on may be of help to the court, but do not control."

Thus, if plaintiff is permitted to add the requisite proof of damages to the record, the court could award such damages against defendants BURR, LORD, and PHILIPS, APPEL & WALDEN, notwithstanding the request for rescission. In fact, plaintiff's complaint requested such damages in the alternative.

It's axiomatic that the trial court under Rule 59(a), in its discretion, may grant a new trial to do substantial justice.

"In line with the English common law, a timely motion for new trial is addressed to the sound judicial discretion of the trial court. No rigid nor fixed formula can or should prescribe how this principle is to be universally applied."

The trial court, which has a feel for the case, should apply the principle so that substantial justice is done on the facts of the individual case." 6a Moore's Federal Practice ¶59.05[5], p. 3756.

"Insofar as the motion for a new trial is concerned, it is clear that under Fed. Rules Civ. Proc. rule 59, a trial court is vested with ample power to grant a new trial in order to see that justice is done." Schneider v. U.S. Steel Corp. 147 F.Supp. 289 (D. Minn. 1957)

In Foliner Graflex Corp. v. Graphic Photo Service, 45 F.Supp. 749 (D. Mass. 1942) the court acknowledging it has "not given sufficient consideration" to certain legal precedents, opened a judgment and granted a new trial on specific limited issues "in the interests of justice." (p. 750)

In our case substantial justice compels that plaintiff be made whole and defendants BURR, LORD, and PHILIPS, APPEL & WALDEN be held responsible for their wrongful acts. If BURR is judgment proof, plaintiff will not be recompensed under the present judgment and defendants LORD, and PHILIPS, APPEL & WALDEN, will avoid their proper liability for their wrongful acts.

6A Moore's Federal Practice, ¶59.06, p. 3764 provides "in cases tried without a jury the court may do all on a rehearing that justice and necessity dictate, including

limiting the new trial to specific issues. "

"Under Rule 59(a) Rules of Civil Procedure, 28 U.S.C.A., the Court is authorized to grant a new trial on all or part of the issues and it is the duty of the court to grant that right where the justice of the case is clear * * * and this applies to a retrial as to the issue of damages as well as to any other particular issue. " Sanders v. Green, 208 F. Supp. 873, 878 (E.D.S.C. 1962)

In a non jury case the court need not grant an actual new trial but may merely take additional testimony. Fed. Rules Civ. Proc. Rule 59(a). Thus, the court is empowered to reopen the trial for the limited purpose of taking testimony as to common law damages without relitigating the entire lawsuit.

"The court necessarily has greater freedom in determining what its action should be on a motion for new trial in a court action than on a like motion in a jury action * * * [T]here will be many times when proper relief may be accorded by something far less than an actual new trial, such as the taking of additional testimony * * *." 6A Moore's Federal Practice, §59.07, p. 3772.

Under Rule 60(a)(1) the court can grant plaintiff relief for mistake, inadvertence or excusable neglect.

"60(b) is a remedial rule to be liberally construed". 7 Moore's Federal Practice, §60, 22 [2], P. 247.

"The rule is broad enough to cover mistakes on the part of counsel induced by an erroneous view of the law. " id at p. 251.

Assuming plaintiff's counsel erroneously viewed the law of rescission, so that LORD, and PHILIPS, APPEL & WALDEN, were somehow released from liability by such election of remedies, then such error is certainly excusable in light of the law contained in Point I infra.

Such errors by counsel have previously moved the court to grant relief under Rule 60(b)(1). Fleming v. Huebsch Laundry Corp., 159 F. 2d 581 (7th Cir. 1947); La Barbera v. Grubard, 112 F. 2d 738 (2d Cir. 1940); Robins v. Pitcairn, 3 Fed. Rules Serv. 60b. 21, case 2 (N.D. Ill. 1940).

Under Rule 60(b)(6), the court may grant relief for any other justifiable reason. Justice Black has stated:

"In simple English, the language of the 'other reason' clause for all reasons except the five particularly specified, vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." Klapprott v. U.S., 335 U.S. 601, 614-615 (1948).

POINT IV

INASMUCH AS THE DISTRICT COURT'S
REFUSAL TO GRANT A NEW TRIAL AS
TO DAMAGES WAS BASED ON AN
ERRONEOUS VIEW OF ITS POWER, THE
COURT OF APPEALS MAY REVERSE THE
LOWER COURT'S DETERMINATION AND
ORDER A NEW TRIAL.

Although as a general rule the granting or refusal of a new trial is a matter resting within the discretion of the Trial Court, the exercise of that discretion may be reviewed by the Appellate Court when it appears to be based upon an erroneous view of the law or amounts to an abuse of discretion. Commercial Credit Corp. v. Pepper, 187 F.2d 71 (5th Cir. 1951); Allstate Insurance Co. v. Springer, 269 F.2d 805 (6th Cir. 1959) cert. den. 361 U.S. 932 (1960); Williams v. Nichols, 266 F.2d 389 (4th Cir. 1959); Dagnello v. Long Island Ry. Co., 289 F.2d 797, (2d Cir. 1961).

Thus, in the Commercial Credit Corp. v. Pepper case, supra, the court said, 187 F.2d at 75:

"Under the circumstances presented, and quite independent of the error in the charge, we are of opinion that the trial court erred in denying

plaintiff's motion for a new trial. It is a principle well recognized in the federal courts that the granting or refusing of a new trial is a matter resting within the discretion of the trial court. The term "discretion", however, when invoked as a guide to judicial action, means a sound discretion, exercised with regard to what is right and in the interests of justice. And an appellate court is not bound to stay its hand and place its stamp of approval on a case when it feels that injustice may result. Quite to the contrary, it is definitely recognized in numerous decisions that an abuse of discretion is an exception to the rule that the granting or refusing of a new trial is not assignable as error."

Because of the Trial Court's certainty that rescission was not available against LORD, and PHILIPS, APPEL & WALDEN, and that they were not liable to restitution despite their misconduct, the Trial Court gave short shrift to the motion to amend the judgment or for a new trial limited to damages. Thus the court says in its opinion denying the motion:

"He thus appears to be seeking what amounts to an order of rescission against LORD, and P.A. & W. ; since they are not sellers, that is, of course, impossible" (67a).

"In the preceding paragraph I have attempted to demonstrate the illogic of what might be termed plaintiff's contingent liability theory of rescission. That excursus was purely speculative, however, for on the present record he is not entitled to so much as one cent in damages against any of the defendants. It is obvious that he cannot be awarded an amended judgment permitting the recovery of

the balance of the \$45,000 from LORD, and P.A. & W. . . ." (68a)

The court in its opinion (69a, 70a) relied heavily on cases where, for example, an inadvertent mistake of law was made by an attorney or subsequent events made an early decision by an attorney of a course of action appear unwise. This is not the situation in the instant case. If Appellant's attorney were mistaken about the law of rescission such a mistake was well grounded in outstanding authorities. The New York State Court of Appeals case of Mack v. Latta, supra, has been cited with approval by the Supreme Court of the United States in McCandless v. Furland, supra, and as noted earlier, in the case of John Hopkins University v. Hutton, supra, implicit approval to restitution against a broker not in privity of contract has already been given by one circuit. Therefore, if this court should for the first time adopt the position that restitution was not available against a person not in privity of contract, this development would justify allowing a new trial as to damages so that complete justice may be done in this case. The decision of

Appellant's attorney to elect rescission made as it was on the basis of long standing authority, is precisely the kind of excusable neglect that calls for remedy pursuant to Rule 60.

This discussion assumes that the court rejects Appellant's view that in a bill for rescission, restitution of out-of-pocket losses is the proper measure of damages. It is, of course, Appellant's view that having elected rescission, he could not prove damages at the trial since they are not ascertainable in this case until such time as defendant BURR should default in his obligation to make restitution pursuant to the order of the court. Since rescission has been elected, the only applicable measure of damages is the making of the Appellant whole. Therefore damages are inchoate until restitution from BURR has failed. Given this circumstance, justice requires, if nothing else, that the exoneration of LORD, and PHILIPS, APPEL & WALDEN, be without prejudice, and that these words be added to the judgment.

POINT V

THE DISMISSAL OF THE COM-
PLAINT AS TO ELPAC WAS
AGAINST THE WEIGHT OF THE
EVIDENCE.

The evidence indicating involvement of ELPAC in the scheme to defraud Appellant, included among other things, the following:

1. Prior to the sale, and at a time when he was still president of ELPAC, BURR stated that the shares of stock being sold had been hypothecated to secure a loan to ELPAC (86a).
2. At the same time BURR stated that the proceeds from the sale of stock were to be used to pay for the bank loan to ELPAC (240a, 241a).
3. At the same time BURR stated that the stock would be registered, and the consent of the corporation to the sale would be obtained (87a).
4. On August 20th, while BURR was still a member of the Board of Directors to ELPAC, he wired Appellant and stated that registration of the stock had been approved by the ELPAC board on August 7, 1968 (Exhibit "4", 346a).

In dismissing the claim against ELPAC, the trial court gave little weight to this evidence and held that the transaction involved did not include any corporate acts.

The court said:

"The question of Elpac's liability is a difficult one largely because plaintiff has failed to introduce any greater evidence of Elpac's involvement than the fact that Burr was for a time Elpac's president. If I were to find Elpac liable, it would be on this fact alone, and I am unwilling to reach such a conclusion. My refusal to hold Elpac liable here is less a reflection on Elpac's role than a comment on the exceedingly meagre state of the record. Before a defendant is required to meet its burden of good faith under § 20(a), plaintiff must make a prima facie showing that the defendant in some meaningful sense "controlled" the actions of one liable under § 10(b). I find no evidence in this record of control, direct or indirect of Burr by Elpac in what were clearly not corporate acts. I therefore hold that Elpac is not liable under § 20(a)." (41a, 42a)

In so holding, the court failed to give due consideration to the fact that the evidence against ELPAC was un rebutted by any testimony proffered on behalf of ELPAC. Also, that if in fact the proceeds from the loan were not used to repay a corporate indebtedness of ELPAC, and if in fact ELPAC did not approve the sale or give its approval to registration of the stock, then these were matters within ELPAC's knowledge and proof of them ought to have been readily available to ELPAC. Yet no evidence was produced by ELPAC, tending to disprove facts established by plaintiff's case.

Under these circumstances there comes into play the well known rule of evidence that where a party has under its control evidence relating to a particular issue and fails to produce that evidence, the strongest possible inference against that party should be drawn from the opposing evidence. Thus the Supreme Court of the United States said in the case of Kirby v. Tallmedge, 160 U.S. 379, 383 (1896):

"As they had it in their power to explain the suspicious circumstances connected with the transaction, we regard their failure to do so as a proper subject of comment. "All evidence", said Lord Mansfield in Blatch v. Archer, (Cowper, 63, 65) "is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other side to have contradicted." It would certainly have been much more satisfactory if the defendants, who must have been acquainted with all the facts and circumstances attending this somewhat singular transaction, had gone upon the stand and given their version of the facts. McDonough v. O'Niel, 113 Mass. 92; Commonwealth v. Webster, 5 Cush. 295, 316. It is said by Mr. Starkie, in his work on Evidence, vol. 1, p. 54: "The conduct of the party in omitting to produce that evidence in elucidation of the subject-matter in dispute, which is within his power, and which rests peculiarly within his own knowledge, frequently affords occasion for presumptions against him, since it raises strong suspicion that such evidence, if adduced, would operate to his prejudice."

The court's failure to give this long standing principle

of evidence due consideration is quite evident when it comments on the proof (or lack thereof) of ELPAC's board's authorization of registration rights for the stock. The court said:

"...It is not even entirely clear whether or not the Elpac board ever authorized registration rights for the stock Burr sold. Despite the representation in Burr's telegram, no corporate minutes were introduced in evidence to substantiate this claim. The extent of Elpac's involvement in this transaction appears to have been the purely ministerial act of transferring some of Burr's shares on the book of its transfer agent." (41a)

As a matter of fact, Appellant had demanded production of the minutes of the crucial meeting of August 7, 1968 and ELPAC had been unable to produce those minutes (323a). It was at this very meeting that BURR resigned as president of the corporation (41a). Although, as a director, BURR might not be able to bind the corporation after his resignation as president, certainly his statements as to what happened at the meeting are evidence, particularly since he continued as a director. The failure of ELPAC to offer any evidence contradicting those matters recited above made it incumbent upon the court to draw the strongest possible inference from the evidence against ELPAC.

This the court plainly did not do. Therefore, its decision dismissing the claim against ELPAC was against the weight of evidence.

CONCLUSION

Inasmuch as a bill of rescission may decree restitution against culpable parties not in privity of contract, the trial court erred in dismissing Appellant's claim for failure to state a claim against LORD, and PHILIPS, APPEL & WALDEN. Although the trial court expressed certitude as to the correctness of its dismissal, the large body of law on Appellant's behalf justified Appellant's course of action in believing rescission did lie against LORD, and PHILIPS, APPEL & WALDEN. In the interest of justice, a new trial as to damages should be ordered since the exoneration of parties culpable under the Securities Exchange Act is contrary to congressional policy. Finally, even if a new trial is not proper at this point, the dismissal against LORD, and PHILIPS, APPEL & WALDEN, with prejudice is improper since damages are inchoate and the door should be opened for Appellant to bring a new action should restitution from BURR fail.

Respectfully submitted,

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Attorney for Appellant

Of Counsel:
JOHN C. KLOTZ

U.S. COURT OF APPEALS:SECOND CIRCUIT

Index No.

GORDON,

Appellant,

against

BURR, et al,

Appellees.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK

ss.:

I, Victor Ortega, being duly sworn,
deposes and says that deponent is not a party to the action, is over 18 years of age and resides at
1027 Avenue St. John, Bronx, New York
That on the 23rd day of July 1974 at *
deponent served the annexed *Appellants Brief* upon
*

the in this action by delivering ² ^{ies} a true copy thereof to said individual
personally. Deponent knew the person so served to be the person mentioned and described in said
papers as the Attorney(s) herein,

Sworn to before me, this 23rd
day of July 19 74

Victor Ortega
Print name beneath signature

VICTOR ORTEGA

Robert T. Brin
ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0418950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975

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